

APPEAL NO. 022940
FILED JANUARY 7, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 28, 2002. The following issue was before the hearing officer: Is the respondent (claimant) a seasonal employee, and if so, what is the adjusted average weekly wage (AWW) and effective dates for adjusting temporary income benefits (TIBs)? The hearing officer determined that the claimant is a seasonal employee, the adjusted AWW is \$138.04, and the effective dates for adjusting TIBs is from May 23 through August 19, 2002. The hearing officer also found that the claimant had disability from May 23 through August 19, 2002. The appellant (self-insured) appeals the hearing officer's determination that the adjusted AWW is \$138.04 for the period of May 23 through August 19, 2002. The self-insured also asserts that the issue of disability was not before the hearing officer and was improperly decided. The claimant urges affirmance. The hearing officer's determination that the claimant is a seasonal employee was not appealed and is, therefore, final. Section 410.169.

DECISION

Affirmed in part, reversed and rendered in part.

The self-insured sought to adjust the claimant's AWW to \$0.00 for the period of May 23 through August 19, 2002. The parties stipulated that the claimant worked as a cook in a school cafeteria, when she sustained a compensable injury on October 2, 2001. The claimant's employment contract, in effect at the time of the compensable injury, was for the term of one school year beginning August 9, 2001, and ending on May 23, 2002. The claimant stated that her salary payments, however, were spread over a 12 month period and, in prior years, she had received payments from the employer during the summer months for work she had done over the course of the previous school year. The claimant testified that she was not employed during the summer months of the prior two school years but had worked for the employer in the summer of 1999. The claimant further testified that she was unable to work during the summer of 2002 due to her injuries and was unsure whether she would have sought summer employment had she been able to return to work. Given this evidence, the hearing officer found that claimant was a seasonal employee, who had a "reasonable expectation that her wages would continue because she, in the past, had been paid her annual salary throughout the summer periods." The hearing officer, therefore, left unchanged the claimant's AWW for the period of May 23 through August 19, 2002.

The hearing officer erred in determining that the claimant's adjusted AWW is \$138.04 for the period of May 23 through August 19, 2002. Section 408.043(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.5(c)(Rule 128.5(c)) provide that the AWW of an employee may be adjusted to more accurately reflect the wages the employee could "reasonably have expected to earn during the period that TIBs are

paid.” The rule further provides that evidence of reasonably expected earnings should include an employee’s earnings in corresponding time periods of previous years. Rule 128.5(c). In Texas Workers’ Compensation Commission Appeal No. 992829, decided February 2, 2000, we recognized that salary payments made to a school employee during the summer months for work that was done over the course of the previous school year should not be considered for purposes of determining entitlement to an adjustment of AWW. See *also* Texas Workers’ Compensation Commission Appeal No. 92688, decided February 5, 1993 (holding that a teacher’s salary had accrued on or before the last day of the employment contract and thus did not constitute wages for the period of unemployment); *and compare* Texas Workers’ Compensation Commission Appeal No. 022860-s, decided January 3, 2003 (applying new Section 408.0446 for compensable injuries that occur on or after December 1, 2001, which provides that a school district employee’s AWW and any subsequent adjustments are computed on the basis of wages earned in a week rather than on the basis of wages paid in a week). Accordingly, the hearing officer’s determination that the claimant’s adjusted AWW is \$138.04 is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In view of the claimant’s testimony that she did not work during the two previous summer periods, we reverse the hearing officer’s determination and render a decision that the claimant’s adjusted AWW is \$0.00 for the period of May 23 through August 19, 2002.

As indicated above, the self-insured also appeals the hearing officer’s determination that claimant had disability from May 23 through August 19, 2002, due to the compensable injury. Although not certified as an issue, we observe that the matter of disability was actually litigated by the parties. The issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer’s disability determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

The decision and order of the hearing officer are affirmed with regard to the disability finding and reversed and rendered with regard to the adjustment of AWW for the period of May 23 through August 19, 2002.

The true corporate name of the insurance carrier is, **a governmental entity that self-insures, either individually or collectively through the TEXAS ASSOCIATION OF SCHOOL BOARDS RISK MANAGEMENT FUND** and the name and address of its registered agent for service of process is

**MM
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Edward Vilano
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Terri Kay Oliver
Appeals Judge